Circuit Court for Prince George's County
Case No. C-16-CV-23-002918

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2147

September Term, 2024

MARLOW HEIGHTS SHOPPING CENTER LIMITED PARTNERSHIP

v.

MACY'S RETAIL HOLDINGS, LLC, ET AL.

Nazarian,
Shaw,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 12, 2026

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

The topic of this appeal is whether an easement for parking and ingress/egress exists at the Marlow Heights Shopping Center ("Shopping Center") in favor of Macy's Retail Holdings, LLC ("Macy's"), the appellee.[1] In 1958, a predecessor-in-interest to Marlow Heights Shopping Center Limited Partnership ("Marlow Heights"), the appellant, and a predecessor-in-interest to Macy's entered into a Memorandum of Agreement ("MOA") in which Macy's agreed to purchase from Marlow Heights a parcel of land in the Shopping Center Marlow Heights was developing in Prince George's County and build a department store on it; and Marlow Heights agreed to grant in the deed of conveyance an easement for parking and ingress/egress to serve the department store.[2] In 1959, the deed ("1959 Deed") was executed and recorded in the Land Records for Prince George's County, along with the MOA and a Modifying Memorandum of Agreement ("MMOA"). The 1959 Deed fully incorporated the MOA and in boilerplate language conveyed any "easements[.]"

More than sixty years later, in the Circuit Court for Prince George's County, Macy's filed a single count complaint against Marlow Heights seeking a declaration that the 1959 Deed and the MOA conveyed an express easement for parking or, if not, that Macy's had acquired such an implied easement based upon the decades-long history of conduct of the parties. Following a bench trial, the court entered judgment in favor of Macy's, ruling that

[1] Chanan, LLC, was a plaintiff below and also is an appellee. It did not file a brief in this Court. As we will explain, its interest is derivative of the interest Macy's has. When discussing the arguments raised and the relief granted to the appellees in this case, all references to Macy's are inclusive of Chanan, unless otherwise indicated.

[2] For ease of communication, we shall refer to the easement for parking and for ingress and egress simply as the easement for parking.

it was the beneficiary of an express easement in the 1959 Deed or, alternatively, an implied easement. After Macy's obtained a survey to establish the precise bounds of the easement, the court entered its final declaratory judgment.

Marlow Heights appeals, presenting four questions for review,[3] which we combine and rephrase as three:

> I. Did the circuit court err by not dismissing the complaint as time barred?
>
> II. Did the circuit court err by ruling that Macy's is the beneficiary of an easement, either express or implied?
>
> III. Did the circuit court err by declaring the location of the easement based upon a post-trial survey prepared by Macy's?

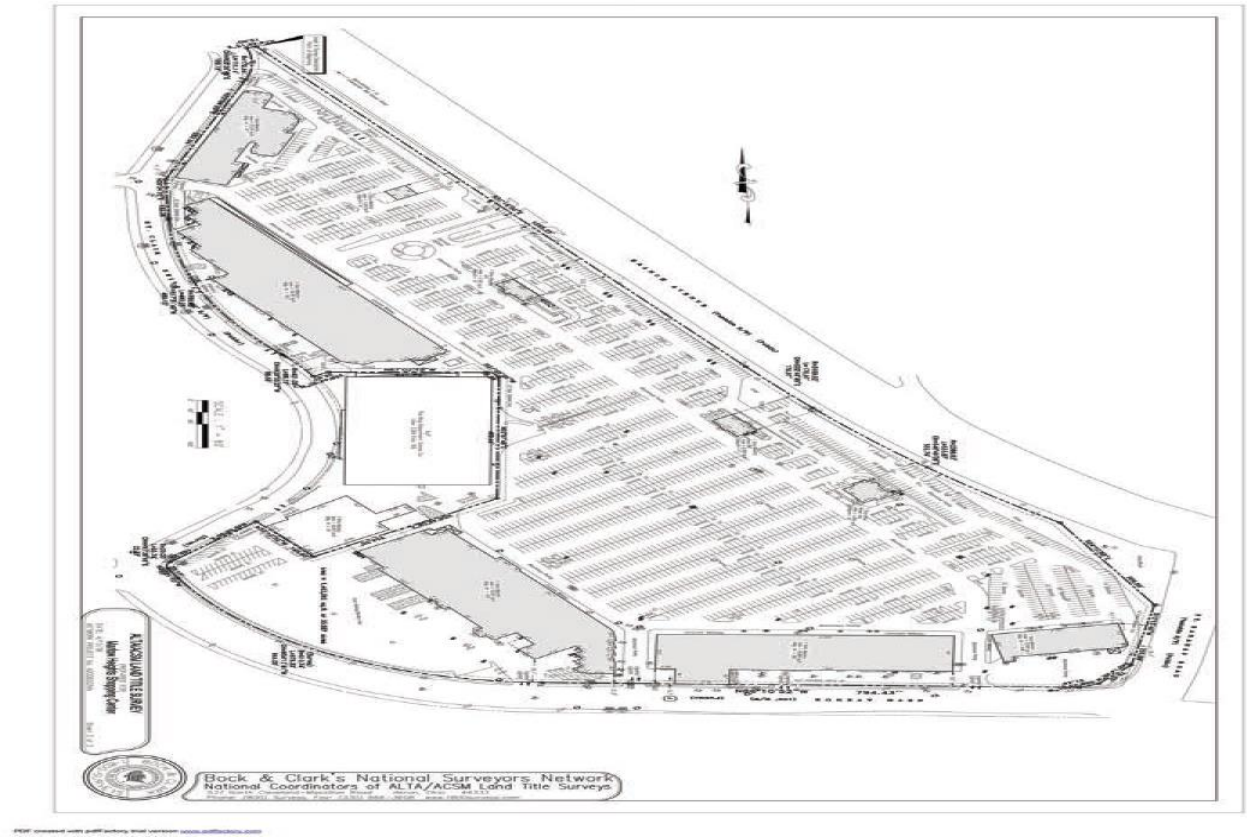
We answer these questions in the negative and shall affirm the judgment of the circuit court.

[3] The questions as posed by Marlow Heights are:

> 1. Did the Circuit Court err by failing to dismiss the complaint as time-barred where the limitations period for relief concerning the Deed had run in 1962?
>
> 2. Did the Circuit Court err by holding that an express easement exists where no document, recorded or otherwise, has ever purported to create or convey the alleged easement?
>
> 3. Did the Circuit Court err by holding that an implied easement of an unspecified variety exists, based solely on two specific findings that are irrelevant to implied easements?
>
> 4. Did the Circuit Court err by declaring the location of an easement by reference to a post-trial survey conducted by Appellees with no evidentiary basis, and which includes areas as to which Appellees specifically stated they were not seeking relief?

FACTS AND PROCEEDINGS

The Shopping Center, located at 4101 Branch Avenue in Marlow Heights, opened in 1960 as one of the early automobile-centric shopping centers in Maryland. It comprises 450,000 square feet of land and has approximately sixty tenants. It is bounded by St. Clair Drive to the north and west, Branch Avenue to the east, and 28th Avenue to the south. Macy's owns land and a department store building ("the Property") at the Shopping Center. In the layout of the Shopping Center depicted below, the Property is the large, unshaded square. The smaller unshaded parcel to its immediate south originally was part of the Property but now is owned by Chanan, LLC, which operates a self-service laundromat there. The shaded rectangle to the south of the Chanan property has been a Giant Food store since the Shopping Center opened.



In its front-facing area, the Shopping Center has two large "parking fields." There is one smaller "parking field" to the rear of the Chanan property and adjacent to the Giant. The main entrance to the Shopping Center is on Branch Avenue, but there are smaller entrances on St. Clair Drive and 28th Avenue.

Development of the Shopping Center and the Department Store

On October 6, 1958, Bradley Realty Corporation ("Bradley"), on behalf of the May Department Stores Company ("May"), and Marlow Heights Land Corporation ("MHLC") executed the MOA. May was the parent company of Hecht's department stores, a well-established and popular retailer in Maryland. Marlow Heights is the successor-in-interest to MHLC and Macy's is the successor-in-interest to Bradley and May.

In the recitals of the MOA, the parties agreed that Marlow Heights was developing the Shopping Center and wished to convey the Property, an approximately 3.1-acre parcel of land within the Shopping Center, to Macy's to build a department store. Macy's sought assurances that there would be "adequate parking areas for the use of itself and its customers, free and without charge," with full access to and from private and public roadways, and asserted that it was entering into the MOA to accomplish that.

In Section 1, the parties agreed:

> After the signing of these presents, [MARLOW HEIGHTS] will deed and convey to [MACY'S], upon its request, approximately 3.1744 acres of land properly zoned for commercial use . . . as shown on the plat attached hereto . . . marked EXHIBIT "A". . . . ***In the deed of conveyance [MARLOW HEIGHTS] shall grant to [MACY'S], its successors and assigns, a perpetual easement for parking, with full right of ingress and egress,*** *together with full access thereto by all appropriate roads and the right to use all sidewalks, loading platforms and other facilities of the MARLOW HEIGHTS SHOPPING CENTER, hereinafter referred to as the COMMON AREAS, for its own use and that of its customers, employees, licensees and all other persons having business with or desiring reasonable contact or association with [MACY'S],* said COMMON AREAS being shaded in yellow in the plat marked EXHIBIT "B" . . . . The deed conveying said easement shall further provide that [MARLOW HEIGHTS], its successors and assigns, shall forever hold and provide sufficient parking space in the COMMON AREAS aforesaid of the MARLOW HEIGHTS SHOPPING CENTER to accommodate no less than thirty-five hundred (3,500) motor and other vehicles, maintaining a ratio of not less than four (4) square feet of COMMON AREA for every square foot of floor space in the CENTER, which said sum of square feet of floor space shall be reduced by twenty (20%) per cent to allow for non-selling floor space.

(Emphasis added.)

In Section 2, Marlow Heights agreed that within a specified period of time it would submit to Macy's a permanent plan for the Shopping Center showing "the pattern of all

means of ingress and egress, . . . parking areas, sidewalks . . . , loading areas and other improvements." That plan would be attached to the MOA and designated as "Exhibit B." Exhibit B is referenced in Sections 1 and 2 of the MOA, and likely later was attached, but the parties have not been able to locate it.

In Section 6 of the MOA, the parties further agreed:

> [MARLOW HEIGHTS] shall grant to [MACY'S] a non-exclusive right to use the parking areas to be provided by [MARLOW HEIGHTS] in the MARLOW HEIGHTS SHOPPING CENTER for the accommodation and parking of vehicles of [MACY'S] and its concessionaires,[4] their respective officers, agents and employees and their customers while such customers are shopping in the STORE or merchandising areas to be provided by [MACY'S] or in any other portion of the Center, together with public conveniences, if any, of the Center, and access thereto by appropriate roads of ingress and egress, and all other areas in the Center to be used in common by tenants and occupants of the Center; such parking areas, public conveniences and other common areas being collectively referred to as "COMMON AREAS."

The parties agreed that "identical terms" to those in Section 6 would be included in every lease agreement between Marlow Heights and tenants of the Shopping Center.

In Section 7, Macy's promised to pay a monthly common area maintenance charge ("CAM") to Marlow Heights equivalent to one-twelfth of its pro rata annual share of those costs, which would be calculated based on its share of the total floor space in the Shopping Center.

[4] At trial, a witness for Macy's explained that the term "concessionaires" means businesses operating independently within a department store, such as an in-store restaurant or a shoeshine company.

On April 10, 1959, five months after the MOA was signed, predecessor-in-interest Bradley conveyed its right, title, and interest in the MOA to predecessor-in-interest May.

Four months after that, on July 16, 1959, the parties' predecessors-in-interest entered into the MMOA, which changed the size and exact location of the parcel to be conveyed to Macy's. A "Permanent Plan" for the Shopping Center was attached to the MMOA, depicting the layout of the Shopping Center, including parking areas and access roads. Nothing in the MMOA changed Marlow Heights's obligation to grant an easement for parking to Macy's.

The day after the MMOA was signed, Marlow Heights (by predecessor-in-interest MHLC) executed the 1959 Deed. The deed stated that for the consideration of $10, Marlow Heights "does grant and convey" to Macy's "the following described land and premises, with the improvements, **easements** and appurtenances thereunto belonged, situate, lying and being in Prince George's County, State of Maryland, namely" property then described by metes and bounds. (Emphasis added.) The deed went on to provide:

> TOGETHER WITH and subject to all of the provisions set forth in a certain Memorandum of Agreement between [MARLOW HEIGHTS], and [MACY'S], dated October 6, 1958 . . . and the provisions of a Modifying Memorandum of Agreement between the parties hereto dated July 17th, 1959, which Memorandum of Agreement and Modifying Memorandum of Agreement are recorded immediately prior hereto, **and the provisions of both of which Agreements are specifically incorporated in this Deed as fully as if they had been set forth at length herein, and which agreements shall survive this Deed.**

(Emphasis added.) The deed was signed by Marlow Heights only.[5] On July 21, 1959, the deed, the MOA, and the MMOA were recorded in the Prince George's County Land Records.

Macy's proceeded to construct a department store on the Property. The store operated as a Hecht's from the time the Shopping Center opened, in 1960, until 2005, when Macy's acquired predecessor-in-interest May in a merger. Macy's succeeded to May's interest under the 1959 Deed, the MOA, and the MMOA, and began operating the store under the Macy's name.

Meanwhile, in 1992, Macy's sold 6,000 square feet of the Property to Goodyear Tire and Rubber Company ("Goodyear"), which operated a tire company there. In 2017, Goodyear conveyed the same parcel to Chanan. The legal description of the outparcel in the 1992 and 2017 deeds specified that it was conveying a "non-exclusive right to use those certain easements for parking, ingress and egress granted to [May] in Paragraph 6 of the

[5] A deed signed only by the grantor is a "deed poll." *See* Md. Code (1974, 2023 Repl. Vol.), § 4-102 of the Real Property Article ("RP"), which states:

> If a deed contains a covenant by the grantee or a reservation of an incorporeal interest in the property granted by the deed and is signed only by the grantor (deed poll), the acceptance of delivery of the deed by the grantee binds the grantee to the provisions in the deed as effectively as if he had signed the deed as a grantee.

See also Master Fin., Inc. v. Crowder, 409 Md. 51, 64 (2009) (referring to RP § 4-102 as "[t]he deed poll statute" and explaining that acceptance of delivery of the deed binds the grantee "to the provisions of the deed" even though the grantee did not sign it (cleaned up)).

[MOA] . . . subject to and in accordance with all the terms and provisions of the [MOA]."[6] The parties agree that Chanan's interest in any easement is derivative of the interest Macy's has.

Macy's Closes Its Store

In March 2021, Macy's closed its store at the Shopping Center due to poor sales. It continued to pay the CAM charges as required by the MOA.

In August 2022, pursuant to Section 24 of the MOA, Marlow Heights asked Macy's to approve a site plan for constructing a standalone Starbucks coffee store in the parking area of the Shopping Center.[7] Macy's previously had approved other standalone stores in the parking area. It withheld approval of the Starbucks, however, requesting certain changes and asking Marlow Heights for "evidence" of the easement. Two months later, counsel for Macy's wrote to Marlow Heights's counsel requesting information about the precise parking area and asking it to execute a deed conveying the easement promised in the MOA. Marlow Heights refused that request.

[6] As set out above, Section 1 of the MOA contained the promise to convey an easement, whereas Section 6 of the MOA granted Macy's employees and customers a non-exclusive right to use the parking areas and the access roads in common with all other tenants of the Shopping Center.

[7] Section 24 of the MOA provides, in relevant part: "The OWNER agrees that before making any leases or conveyances of any property immediately adjacent to that conveyed to the STORE, it will inform the STORE of said intended lease or conveyance which will not be consummated unless the STORE approves, but said approval shall not be unreasonably withheld."

On June 20, 2023, Macy's entered into a contract to sell the Property to TeamGov, Inc. ("TeamGov"), a project management company. TeamGov requires perpetual parking rights. Marlow Heights, which under Section 22 of the MOA has approval rights for any contract purchase of the Property, declined to approve the sale.

Macy's Files Suit

On June 23, 2023, three days after entering into the contract of sale with TeamGov, Macy's filed this declaratory judgment action.[8] It alleged that a dispute had arisen because Marlow Heights refused to acknowledge the existence of the perpetual easement for parking and access, which in turn materially affected the Property's marketability. Macy's asked the court to declare that it has a "perpetual easement for parking and access upon the common area portions of [the Shopping Center] as provided in Section 1 of the MOA and non-exclusive use rights as provided in Section 6 of the MOA" and in the 1959 Deed.

The Trial

A bench trial was held on April 1 and 2, 2024. At the outset, the court heard argument on Marlow Heights's pending motion for summary judgment, in which it asserted that, on the undisputed material facts, and as a matter of law, Macy's did not have an easement of any sort and in any event its action was barred by the general three-year statute of limitations, which applies to breach of contract claims. *See* Md. Code (1974, 2020 Repl. Vol.), § 5-101 of the Courts & Judicial Proceedings Article ("CJP"). The court denied the motion.

[8] As noted, Chanan was a plaintiff as well.

Macy's called two witnesses: Jason Williams, its senior director of real estate, and Kenneth Siu, the president and owner of Chanan and the operator of the laundromat parcel.

Mr. Williams testified that, when Macy's purchased properties for use as department stores, typically it would enter into reciprocal easement agreements for parking and for ingress and egress. To Mr. Williams's knowledge, Marlow Heights never had interfered with Macy's parking, ingress, or egress in the sixty plus years a department store was open and operating at the Shopping Center. He identified a plat of the Shopping Center completed from a 2006 survey (the "ALTA plat"), reproduced earlier in this opinion, that reflects the current layout of the Property, including parking and ingress and egress points. He explained that all the parking depicted on the ALTA plat has been available for use by employees and customers of the department store. Mr. Williams testified that Macy's remains responsible for CAM charges under the MOA and pays them.

Mr. Siu identified the documents conveying to Chanan its interest in the laundromat parcel.

Macy's moved into evidence the pertinent documents, including the MOA, the MMOA, the 1959 Deed, the deeds pertaining to the sales to Goodyear and from Goodyear to Chanan, the purchase and sale agreement between Macy's and TeamGov, and an aerial photograph of the Shopping Center.

At the close of Macy's' case, Marlow Heights moved for judgment, arguing that the evidence did not alter its legal analysis, which turned upon the construction of the MOA and the 1959 Deed, neither of which granted Macy's an easement. It took the position that

its predecessor-in-interest had breached the MOA by not conveying the promised easement, but the three-year statute of limitations on the breach of contract claim applied and expired in 1962. Marlow Heights maintained that, by virtue of Section 6 of the MOA, Macy's received a non-exclusive contractual right to use the parking fields in the Shopping Center that is binding on its successors and assigns, and therefore, is a covenant running with the land. The covenant is enforceable by Macy's and by its successors and assigns.

Macy's responded that, by incorporating the MOA into the 1959 Deed, Marlow Heights's predecessor-in-interest clearly intended to convey a perpetual easement in general terms and did so.

The court denied the motion for judgment.

In its case, Marlow Heights called Michael Miller, who at the time was working for the Shopping Center's management company. Mr. Miller testified that the Shopping Center had been struggling for many years, with the failure of a movie theater tenant and market trends favoring online shopping. Macy's closure further negatively affected the Shopping Center's business and caused some tenants not to renew their leases.

Mr. Miller explained that when Marlow Heights decided to create a pad site for a Starbucks in the parking lot, it sought permission from Macy's (and from Giant) to do so because, under the terms of the MOA, it was obligated to maintain certain parking ratios for each property. He testified that the request for permission was not an acknowledgment by Marlow Heights of any claimed right of easement in favor of Macy's.

According to Mr. Miller, all tenants, owners, employees, and customers are free to use any parking spaces at the Shopping Center, to use any of the ingress and egress points at the Shopping Center, and to make use of the sidewalks and other commons areas in the Shopping Center. At no time in the history of the Shopping Center had Marlow Heights interfered with Macy's' parking or access rights. Mr. Miller opined that those rights are guaranteed under Section 6 of the MOA.

On cross-examination, Mr. Miller testified that the covenant running with the land created by Section 6 of the MOA is not terminable by Macy's. Consequently, if Macy's sells the Property, the purchaser will be responsible for the CAM charges under the MOA.

Marlow Heights also read into evidence excerpts from Mr. Williams's and Mr. Siu's deposition testimony. As pertinent, Mr. Williams testified at deposition that the easement claimed by Macy's was "over the entirety of the common areas" at the Shopping Center.

At the close of all the evidence, Marlow Heights renewed its motion for judgment on the same bases. The court denied the renewed motion and reserved on the matter pending submission of written closing arguments.

The Court's Ruling

The court reconvened on July 12, 2024, and ruled from the bench that Macy's was the beneficiary of an express easement in the 1959 Deed. The court reasoned that the MOA evinced a "clear intent" to convey a perpetual easement, and that the easement could be located on the ground without difficulty based upon other information in the MOA, the MMOA, and the 1959 Deed. It emphasized that the "footprint" of the Shopping Center had

not changed since those documents were executed; and the parking, access roads, and other common areas largely were the same as they were originally.

Alternatively, the court ruled that the parties' course of conduct over the past sixty years had given rise to an implied easement.

Upon counsel for Marlow Heights's request for clarity about the precise location of the easement, the court and counsel engaged in dialogue and the court directed Macy's to obtain a survey of the parking fields and access roads. During that discussion, counsel for Macy's reiterated that it had consistently claimed an easement over the entirety of the parking areas, sidewalks, and access roads within the Center. The court stated that, once Macy's had obtained a survey of those areas, it would issue its final declaratory judgment.[9]

On January 9, 2025, after Macy's had submitted a survey and a proposed final order and Marlow Heights had filed its objections, the court entered a final declaratory judgment, adopting the survey provided by Macy's.[10] The court declared that Macy's had

> a perpetual easement *upon the parking areas and access roads* which are part of the Marlow Heights Property, as described in the Description of a Parking and Ingress/Egress Easement Across the Lands of Marlow Heights Shopping Center Limited Partnership annexed hereto as **Schedule A** and as depicted in the Parking & Ingress/Egress Easement annexed hereto as **Schedule B** (the "Easement"), for parking and full right of ingress and egress, which runs with their land.

[9] On July 16, 2024, the court entered judgment in favor of Macy's. Macy's moved to alter or amend the judgment, asking the court to vacate the final judgment to await the survey. The court vacated the judgment by order entered July 26, 2024.

[10] The court prematurely entered judgment in favor of Macy's on October 4, 2024, and issued an incomplete judgment in favor of Macy's on December 10, 2024. Both judgments were vacated by the court prior to entry of the final judgment.

(Italicized emphasis added; bolded emphasis in original.) If the Shopping Center were to be redeveloped, the easement would change "in a corresponding manner" to be upon the parking and access roads, wherever located.

This timely appeal followed.

STANDARD OF REVIEW

When an action has been tried to the court, we review "the case on both the law and the evidence" and "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, . . . giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c).

DISCUSSION

I.

The Declaratory Judgment Action Was Not Barred By The Statute of Limitations

As noted, before trial, Marlow Heights filed a motion to dismiss and for summary judgment against Macy's on the ground of limitations, and during trial it moved for judgment on the same ground. It argued that, although the complaint was styled as a declaratory judgment action, in actuality its claim was for breach of contract, which is governed by the three-year statute of limitations in CJP § 5-101. More specifically, Marlow Heights maintained that Macy's was suing for breach of contract - - that is, for Marlow Heights's promising in the MOA to convey an easement in the 1959 Deed, but failing to do so - - and that suit should have been filed within three years of the breach. Instead, it

was filed more than sixty years too late. Marlow Heights contends that, given that circumstance, the circuit court erred by denying its motions.

Macy's responds, as it did below, that because the only relief it was seeking was a declaratory judgment adjudicating its rights under the MOA, the MMOA, and the 1959 Deed, its claim was not for breach of contract and, therefore, was not governed by the statute of limitations that ordinarily would apply to contract actions.

Declaratory judgments, unknown in the common law, are creatures of statute or court rule. In England, they were adopted by rule in 1883, and from then on most equity cases were brought as declaratory judgments instead of as suits for injunctions, specific performance, or other forms of equitable relief. Edwin M. Borchard, *Address Before Lawyers' Club of Cincinnati, Ohio, on May 10, 1928*, 3 U. Cin. L. Rev. 24 (1929). Maryland adopted its own declaratory judgment statute in 1888.[11] Edwin M. Borchard, *The Declaratory Judgment in the United States*, 37 W. Va. L. Rev. 127, 144 (1931). In 1922, the Uniform Declaratory Judgments Act was adopted as a legal framework by the National Conference of Commissioners on Uniform State Laws,[12] *see* uniformlaws.org, and in 1939, the General Assembly enacted the Maryland Uniform Declaratory Judgments Act ("Act"), based on that legal framework. The Act is codified at CJP §§ 3-401 through 3-415.

[11] In the last case decided under that statute, the Court commented: "Resort to the Maryland statute on declaratory decrees has been infrequent since its enactment in 1888." *Saunders v. Roland Park Co.*, 174 Md. 188, 192 (1938).

[12] The National Conference of Commissioners on Uniform State Laws is now called the Uniform Law Commission.

As pointed out by Professor Edwin M. Borchard, the foremost proponent of the Uniform Declaratory Judgments Act, the primary benefit of declaratory judgments is that they are noncoercive actions that can be used to establish a legal right before the right has been violated and harm has resulted. Edwin M. Borchard, *Developments In The Law, Declaratory Judgments 1941 – 1949*, 62 Harv. L. Rev. 787, 789 (1949) ("Borchard, *Harvard L. Rev.*") ("Modern declaratory relief . . . extends the scope of court protection in advance of harm, seeking to forestall rather than merely repair damage."). *See also Stevenson v. Lanham*, 127 Md. App. 597, 611 (1999) (stating that the primary objective of the Act is to relieve litigants of the common law rule that no declaration of rights may be judicially adjudged unless a right has been violated). This Court has recognized that the declaratory judgment action is sui generis, not being inherently legal or equitable. *Murray v. Midland Funding, LLC*, 233 Md. App. 254, 262 (2017). However, "'[d]eclaratory relief may take on the color of either equity or law, depending on the issues presented and the relief sought; that is, a declaratory judgment action assumes the nature of the controversy at issue.'" *LaSalle Bank, N.A. v. Reeves*, 173 Md. App. 392, 411 (2007) (quoting 26 C.J.S. *Declaratory Judgments* § 109 (2006)).

Identifying the nature of the controversy has been essential not only when the statute of limitations has been raised in declaratory judgment cases but also in cases in which a jury trial has been sought.[13] In *Kann v. Kann*, 344 Md. 689 (1997), the Maryland Supreme

[13] The Act provides that the fact that a proceeding is brought under it "does not affect a right to a jury trial which otherwise may exist." CJP § 3-404.

Court explained that, to decide whether a declaratory judgment action is subject to trial by jury, "'the circuit court must look to the underlying circumstances to ascertain whether, prior to the [declaratory judgment] act, legal relief would have sufficed or, alternatively, whether special factors would warrant the intervention of equity.'" *Id.* at 700 (quoting R.W. Bourne & J.A. Lynch, *Merger of Law and Equity Under the Revised Maryland Rules: Does It Threaten Trial By Jury?*, 14 U. Balt. L. Rev. 1, 50 (1984)). The Court held that the question presented in the declaratory judgment action before it arose from the administration of a trust, which "analogizes historically to equity jurisdiction" over the management of trusts and settlement of estates. *Id.* at 701. Because the nature of the controversy was equitable, not legal, the plaintiff was not entitled to a jury trial.

In deciding whether the nature of a declaratory judgment action is legal, as opposed to equitable, courts often consider whether the claim asserted amounts to an "inverted" lawsuit, i.e., "an action brought by one who would have been a defendant at common law[.]" *Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3rd Cir. 1979). *See also Marseilles Hydro Power, LLC v. Marseilles Land and Water Co*., 299 F.3d 643, 649 (7th Cir. 2002); *Siegel v. Goldstein*, 657 F. Supp. 3d 646, 662 (E.D. Pa. 2023). In such a situation, the nature of the action is legal, not equitable, and there is a right to trial by jury.

Closely related to the nature of the issues in controversy is the type of remedy being sought. In *Murray v. Midland Funding, LLC*, *supra*, where the issue was whether a declaratory judgment action was barred by limitations, we held that, while "a simple

declaration" of the rights of the parties has "no time bar at all[,]" 233 Md. App. at 261, if a declaratory judgment action seeks "ancillary remedies," the remedies may be subject to either limitations or laches depending upon whether the relief sought is legal or equitable. *Id*. at 262. Likewise, we can look to the remedial purpose the declaratory judgment later may serve, either as the basis for an equitable decree or a judgment at law. Professor Borchard explained that, although a declaratory judgment in and of itself is a noncoercive remedy, it gives rise to the "possibility of further relief[,]" which in practice gives it immediate coercive effect. Borchard, *Harvard L. Rev*. at 788-89.

In the case at bar, Macy's sought a simple declaration of rights under the MOA, the MMOA, and the 1959 Deed, which is not subject to any time bar. It did not allege a breach of the MOA or MMOA by Marlow Heights's predecessor-in-interest or seek money damages or other ancillary contract remedies that would be subject to a three-year statute of limitations. The objective of the declaratory judgment action was to obtain a judicial determination of the existence of Macy's' easement so that, if necessary, the easement could be enforced. If in the future Marlow Heights were to disregard a declaration of rights in favor of Macy's, the logical next step for Macy's to take would be to sue for injunctive relief, which is equitable, not legal. Thus, Macy's sought a declaratory judgment not as a predicate to obtain damages but to pave the way forward for its agreement to sell the Property, which depended in part upon an easement for parking having been conferred by the MOA, the MMOA, and the 1959 Deed.

Marlow Heights relies upon this Court's decision in *Allied Investment Corp. v. Jasen*, 123 Md. App. 88 (1998), *rev'd*, 354 Md. 547 (1999), to support its limitations argument. This reliance is misplaced. In *Jasen*, the circuit court dismissed two counts in a complaint filed by a lender seeking a declaration as to the validity and priority of a guarantor's pledge of his interest in a limited partnership. We affirmed, holding that although the claims were cast as ones for declaratory relief, they actually were for conversion and were barred by the general three-year statute of limitations applicable to that cause of action. *Id*. at 107-09. Our Supreme Court reversed, holding that as both claims merely sought a simple declaration of rights, they were not conversion claims and therefore were not time-barred. 354 Md. at 558-59.

Here, as in *Jasen*, Macy's sought a simple declaration of its rights under the controlling documents. It did not allege that Marlow Heights breached the obligations created by the documents but that by incorporating the MOA into the 1959 Deed, an express easement was conveyed. It did not seek money damages or other contract remedies. Because Macy's sought no ancillary remedies subject to the three-year statute of limitations, and because to the extent the declaratory judgment it sought could be used in the future as the basis for equitable relief, not damages, the circuit court did not err by concluding that the action was not time-barred and by denying the motion to dismiss and for summary judgment and the motions for judgment at trial.

II.

Declaratory Judgment Regarding Easement

An easement is a "non-possessory interest in the real property of another that can arise either by express grant or implication." *Emerald Hills Homeowners' Ass'n, Inc. v. Peters*, 446 Md. 155, 162 (2016) (cleaned up). "It is a species of 'servitude[,]'" permitting a party to act on or to the detriment of another's property. *USA Cartage Leasing, LLC v. Baer*, 429 Md. 199, 207 (2012). "In general, 'the terms "right of way" and "easement" are synonymous.'" *Anderson v. Great Bay Solar I, LLC*, 243 Md. App. 557, 601 (2019) (quoting *Chevy Chase Land Co. v. United States*, 355 Md. 110, 126 (1999)).

"[A]n express easement can be created only through a written instrument containing 'the names of the grantor and grantee, a description of the property sufficient to identify it with reasonable certainty, and the interest or estate intended to be granted.'" *Bacon v. Arey*, 203 Md. App. 606, 642 (2012) (quoting *Kobrine, L.L.C. v. Metzger*, 380 Md. 620, 636 (2004)). *See* RP § 4-101(a)(1). It may be general or specific. *USA Cartage*, 429 Md. at 208. "An easement is reserved in specific terms when its location is easily discernible, such as from a metes and bounds description, a plat map, or a call." *Rogers v. P-M Hunter's Ridge, LLC*, 407 Md. 712, 731 (2009). "An easement is reserved in general terms[] when it is clear from the intentions of the parties that an easement has been created, but without a precise location." *Id.*

As explained, the 1959 Deed incorporated by reference the MOA language stating that "[i]n the deed of conveyance" Marlow Heights's predecessor-in-interest "shall grant

to [Macy's' predecessor-in-interest], its successors and assigns, a perpetual easement for parking, with full right of ingress and egress[.]" The circuit court ruled that by incorporating that language, the 1959 Deed conferred on Macy's an express easement for parking.

Marlow Heights contends the court erred because the 1959 Deed did not reserve an easement in either specific or general terms. Asserting that "[l]anguage of incorporation . . . cannot do more than the incorporated documents did in the first place[,]" it argues that because Section 1 of the MOA merely provided that Marlow Heights *shall grant* Macy's an easement in the deed of conveyance, the incorporation of the MOA into the 1959 Deed did not itself convey an easement. Rather, it merely incorporated language that promised to convey an easement in the future. Nor did it contain any of the "elements" required to convey an easement.

Macy's responds that the court did not err by applying ordinary principles of contract interpretation to conclude that Marlow Heights plainly intended to convey an easement when it incorporated the MOA into the 1959 Deed. It argues that, when the 1959 Deed is read in harmony with the MOA and the MMOA, the deed conveyed to Macy's' predecessor-in-interest a perpetual easement for parking over all the parking areas and access roads in the Shopping Center.

Marlow Heights's argument starts from the premise that the word "shall" as used in the relevant portion of Section 1 of the MOA is the future tense of the verb "to convey." "Shall" has many meanings, however. The future tense is but one, and is not the one

generally applied to legal documents. Black's Law Dictionary lists five definitions for the word "shall." The first meaning, and the one Bryan Garner, the dictionary's editor, comments "is the mandatory sense that drafters typically intend and that courts typically uphold[,]" is: " Has a duty to; more broadly, is required to." *Shall*, BLACK'S LAW DICTIONARY (12th ed. 2024). The other four definitions are: "[s]hould (as often interpreted by courts)"; "[m]ay"; "[w]ill (as a future-tense verb)"; and "[i]s entitled to." *Id.*

Maryland cases addressing the meaning of the word "shall" usually arise in the context of statutory construction and for the most part concern whether "shall" is mandatory or permissive, i.e., does it mean "must" or "may"? Those cases hold uniformly that absent a context indicating otherwise, "the use of the word 'shall' is presumed to have a mandatory meaning and thus denotes an imperative obligation inconsistent with the exercise of discretion." *Johnson v. State*, 282 Md. 314, 321 (1978) (citation omitted), *superseded by statute on other grounds*. *See also State v. Williams*, 255 Md. App. 420, 442 (2022) (observing that the Maryland appellate courts "have consistently held that the term 'shall' ordinarily indicates a mandatory intent unless the context of the statute under examination suggests otherwise"). This Court has commented that "[i]n ordinary usage, the term 'shall' is a word of command, meaning 'must,' and is inconsistent with the exercise of discretion." *Wyatt v. Johnson*, 103 Md. App. 250, 257-58 (1995) (citing BLACK'S LAW DICTIONARY 1375 (6th ed. 1990)).

Nevertheless, the essence of Marlow Heights's argument is that, because the deed conveying the easement was to be prepared and recorded in the future, i.e., not at the same

time as the MOA was executed, the word "shall" in the relevant part of Section 1 of the MOA merely is part of the future tense of the verb "to convey." From that, it follows that incorporation of the MOA into the 1959 Deed only echoed the statement in the MOA that a conveyance was to be effected in the future; and such a statement of future intent itself does not effect a conveyance.

The language of the MOA does not support this argument, however. Throughout the MOA, the word "shall" is used to impose a duty on one or the other of the parties. As a small sampling, "shall" is used in the MOA to require Macy's to designate the acreage to be conveyed (Section 2); to require Macy's to have a minimum of 125,000 square feet of floor space in the department store (Section 3); to require Marlow Heights to grant Macy's a non-exclusive right to use the parking areas for their customers and others; to require Macy's to restrict parking for its employees and others to certain designated areas (Section 6); to require Macy's to pay the CAM charges and to do so on the basis of a specified formula (Section 7); and to require Marlow Heights to complete building the parking area within a certain time before opening of the department store (Section 10). Given the consistent use of the word "shall" in the MOA to impose a duty, we disagree that that word in the operative phrase of the MOA only means the future tense of the verb "to convey." An integrated reading of the MOA leads us to conclude that "shall convey" in that phrase is a statement of duty on the part of Marlow Heights to effectuate the conveyance of an easement to Macy's. To be sure, the duty was to be exercised in the future, when the deed

was executed and recorded, but the primary meaning of "shall convey" in the MOA is "must convey."

Accordingly, the language of the 1959 Deed, incorporating the MOA, can be understood not merely to repeat a promise to convey an easement in the future but to effect the conveyance by referencing Marlow Heights's obligation to do so. And significantly, the 1959 Deed satisfies the statutory criteria in RP § 4-101(a)(1) for conveying a property interest. Under that statute, a deed conveying a property interest must contain "the names of the grantor and grantee, a description of the property sufficient to identify it with reasonable certainty, and the interest or estate intended to be granted[.]" RP § 4-101(a)(1). If those requirements are met, and the deed is "executed, acknowledged, and, where required, recorded[,]" *id.*, it is sufficient to constitute a conveyance. *See Kobrine*, 380 Md. at 635-36 (stating that an easement may be created by express grant consistent with the recording statutes).

The 1959 Deed contains the names of grantor and grantee, i.e., the predecessors-in-interest to Marlow Heights and Macy's; is executed and acknowledged by the predecessor-in-interest to Marlow Heights; and is recorded. It describes the property being conveyed in fee simple, that is, the property on which the department store is to be built, by metes and bounds. Before the metes and bounds description, the deed states that it "does grant and convey . . . the following described land and premises, with the improvements, *easements* and appurtenances thereunto belonged[.]" (Emphasis added.) That is followed by the incorporation of the MOA and the MMOA "in this Deed as fully as if they had been set

forth at length herein," and both of which were "recorded immediately prior hereto[.]" The incorporated MOA describes at Section 1 the interest being conveyed - - a non-exclusive "perpetual easement for parking" over the common areas of the Shopping Center for parking and for ingress and egress. The MOA, together with the MMOA, set out "a description of the property sufficient to identify it with reasonable certainty," *see Bacon*, 203 Md. App. at 642 (cleaned up), specifying that the ingress and egress aspect of the easement applied to "all appropriate roads and the right to use all sidewalks, loading platforms and other facilities of the [Shopping Center.]" "[S]ufficient parking" is defined in Section 1 of the MOA to mean no less than 3,500 parking spaces with "the area designed for parking" to be depicted on a permanent plan. The MMOA included as an attachment a permanent plan depicting the parking areas. These documents, construed together, permitted the court to determine with reasonable certainty that the parking easement was meant to apply to all those spaces. *See Rourke v. Amchem Prods., Inc.*, 384 Md. 329, 354 (2004) (explaining that when a "contract comprises two or more documents, the documents are to be construed together, harmoniously, so that, to the extent possible, all of the provisions can be given effect").[14]

[14] To the extent that the precise location of the easement on the ground was ambiguous, the circuit court was permitted to "look to the surrounding circumstances, including subsequent agreements and conduct of parties, which may evidence the parties' intent." *Rogers,* 407 Md. at 732. The subsequent conduct of the parties reflected that Macy's, its employees, and its customers were allowed to use all the parking spaces and all the sidewalks and access roads throughout the Center.

We conclude that the relevant documents make clear that Marlow Heights intended to convey to Macy's a perpetual easement, as promised in Section 1 the MOA, and that it did so by means of the 1959 Deed incorporating the MOA. We further conclude, moreover, that even if the incorporation language was not sufficient to convey the promised easement, which in our view it was, application of a pertinent equitable principle would produce the same result.

As we have explained, a declaratory judgment action assumes the nature of the controversy at issue. Although the sole claim in this case was for a simple declaration of rights, the nature of the controversy was equitable, because if the parties' rights were adjudged favorably to Macy's, it could use the declaratory judgment as the predicate for an equitable suit for specific performance. Thus, the nature of the proceedings for declaratory judgment in this case is equitable, not legal, calling equitable principles into play. *Murray*, 233 Md. App. at 263.

One well-established equitable principle long recognized in Maryland holds that "equity regards that as done which ought to be done[.]" 27 *Williston on Contracts* § 70:17 (4th ed. 2026). *See In re Est. of Schappell*, 489 Md. 654, 684 (2025) ("'It is a fundamental premise of equitable relief that equity regards as done that which in fairness and good conscience ought to be done. Equity regards substance, not form, and will not allow technicalities of procedure to defeat that which is eminently right and just.'" (quoting *Lankford v. Wright*, 347 N.C. 115, 118 (1997) (cleaned up)). This precept is related to another accepted equitable principle, that the "courts . . . will not permit the forms of law

to be made the instruments of injustice, but will interpose against parties attempting to avail themselves of the rigid rules of law for unfair purposes." *Hyatt v. Romero*, 190 Md. 500, 505 (1948)).

Newark Trust Co. v. Talbot Bank of Easton, 217 Md. 141 (1958), illustrates an application of this equitable principle. There, the parties to the sale of a business entered into an oral agreement that party one would pay money to party two in exchange for party two's promise to execute a release of a lien held against party one's property. The money was paid as consideration, but due to "inadvertence or oversight," a release was not provided. *Id*. at 144. Ultimately, party one brought an action for specific performance against party two, seeking an order directing that an executed release be provided. The trial court granted specific performance, and the Maryland Supreme Court affirmed, stating: "[T]here was nothing inequitable in the agreement, and if it had been performed when agreed, the judgment creditor would have had no just ground of complaint. Since equity regards that as done which ought to have been done, the decree enforcing the agreement was proper[.]" *Id*. at 148 (citation omitted).

The same equitable principle was applied over 100 years ago in *Reliance Life Insurance Co. of Pittsburgh, Pa. v. Bennington*, 142 Md. 390 (1923). There, Jennie Miller, the holder of a life insurance policy in which she named herself as beneficiary, wrote to the insurance carrier stating that she wanted to change the beneficiary to one Galena Bennington. The letter, which complied with all the insurance company's requirements for making a change in beneficiary, arrived at the company's office before Ms. Miller died,

but was not transmitted to the home office and replied to with a new insurance certificate until five days after she died. According to the insurance company's internal rules, the change in beneficiary did not become effective until the certificate was issued by the home office even though Ms. Miller did all she had to do to make the change.

In a suit for specific performance, the circuit court decreed that the policy beneficiary had been changed. Affirming, the Maryland Supreme Court said:

> "If the insured . . . has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued."

Id. at 96 (quoting *Supreme Conclave, Royal Adelphia v. Cappella*, 41 Fed. 1, 5 (E.D. Mich. 1890)).

The maxim has been applied in equitable actions recognizing the existence of an easement. In *Baseball Pub. Co. v. Bruton*, 302 Mass. 54 (1938), the defendant owned a building and the plaintiff ran a business arranging outdoor locations for advertising signs. The two entered into a written agreement by which the defendant gave the plaintiff the exclusive right to place advertisements on the exterior wall of his building, in exchange for a specified payment. After the payment was made, the defendant refused to allow the advertising to be placed. The plaintiff sued to enforce the agreement. The trial court granted the relief sought, and the defendant appealed to the Supreme Judicial Court of Massachusetts. Affirming, that court concluded that the written agreement was a lease that granted the plaintiff a right in the nature of an easement. It explained: "[E]quity treats an act as done where there is a duty to do it enforceable in equity, or, as more tersely phrased,

equity treats that as done which ought to be done[.]" *Id*. at 58. On the basis of that maxim, the court treated the writing as an enforceable contract for the creation of an easement which "actually creates an easement in equity." *Id.*

Even longer ago, the Ohio Supreme Court applied the same equitable principle to conclude that a written instrument created an easement. In *Junction Railroad Co. v. Ruggles*, 7 Ohio St. 1 (1857), a landowner entered into a written agreement granting the Ohio Railroad Company a right of way over his farmland on which to place a portion of its track. The agreement was technically deficient, for want of "more formal execution, to render it a legal conveyance of a perpetual easement in such lands as the grantee might appropriate in conformity to its terms." *Id*. at 5. The Ohio Railroad Company accepted the grant and complied with its conditions. Later, after it defaulted on a loan from the State, it was forced to sell its assets, and the easement was purchased by one Mr. Lane. Junction Railroad Company then purchased those assets from Mr. Lane. The landowner died, leaving his estate to his son. When Junction Railroad Company was to begin occupying the easement, the son attempted to block it from doing so on the ground that a valid easement had not been created. Junction Railroad Company sued the son for an injunction. The trial court granted the injunction and the Ohio Supreme Court affirmed. The latter court stated: "regarding *as done that which ought to be done*, we treat the instrument, for the purposes of this suit, as if it were a formally executed legal conveyance." *Id*. at 5-6 (emphasis in original).

The maxim applies to this case as well. The parties shared mutually beneficial purposes in entering into the MOA. Marlow Heights desired a department store for its new Shopping Center and Macy's desired an easement for parking for its department store customers. A department store anchor was critical to the Shopping Center, and parking at the Shopping Center was critical to the successful operation of the department store. The MOA would not have come into being without the easement agreement. The mutual desires of the parties for a department store and parking were set forth in the two "WHEREAS" clauses of the MOA, and the promise to convey the easement occupied the first section of the MOA, signifying its importance to the parties. Section 1 of the MOA was not changed by the MMOA and was not stricken when the predecessor-in-interest to Marlow Heights incorporated the MOA into the 1959 Deed. The MOA sets out the parties' intent – that Marlow Heights would convey to Macy's a perpetual easement in the deed of conveyance for the Property. The incorporation of the MOA into the subsequent deed of conveyance demonstrates a clear intent to carry out that agreement. That the form of the incorporation failed to accomplish that result is not controlling where, as here, the result intended is plain from the face of the documents. *See, e.g.*, *Ramlall v. MobilePro Corp.*, 202 Md. App. 20, 42 (2011) ("A contract should not be construed to produce a result that is absurd . . . or contrary to the reasonable expectations of the parties."); 27 *Williston on Contracts* § 70:17 (explaining that "[e]quity will act to bring an erroneous writing into conformity with the true agreement"). Thus, applying the maxim that equity treats as done what ought to have

been done, we treat the 1959 Deed incorporating the promise in the MOA to convey a perpetual easement as having carried out that promise.

For all these reasons, the circuit court did not err by ruling that Macy's was the beneficiary of an express easement in the 1959 Deed. Considering this holding, we need not address the court's alternative ruling that Macy's acquired an easement by implication.[15]

III.

Location of the Easement

Following the bench trial, Macy's filed written closing arguments and a proposed final declaratory judgment along with the ALTA plat depicting the parking, sidewalks, and access roads at the Shopping Center. It asked the court to declare that it had an easement "upon the parking areas and access roads which are part of [the Shopping Center] as depicted in the [ALTA] plat[.]"

At the July 12, 2024 hearing, when the circuit court ruled in favor of Macy's, concluding that it was the beneficiary of an express easement, the court reasoned that there was "sufficient evidence" to locate the easement on the ground, noting that the "footprint"

[15] At the bench trial, Marlow Heights argued that Section 6 of the MOA, as incorporated into the 1959 Deed, granted Macy's a non-exclusive right to use the parking spaces and all the common areas of the Shopping Center, including the access roads. It further argued that Section 6 was a covenant running with the land, meaning that it was binding upon the parties' successors and assigns. In this Court, Marlow Heights does not advance this argument. Because we conclude that the court correctly ruled that Macy's benefits from an express easement over those same areas, we need not determine the effect of Section 6.

of the Shopping Center had "not materially changed in 60 years." Implicit in the court's statement was its agreement with Macy's' position, made at the bench trial and in its written closing arguments, that the easement encompassed all the parking fields at the Shopping Center, all the sidewalks, and all the access roads for ingress and egress, as shown on the ALTA plat. It also was consistent with Mr. Williams's testimony at trial that Macy's customers and employees used all the common areas in the Shopping Center freely and that the expectation was that customers could park anywhere in the Shopping Center because they often came to the area to shop or obtain services at multiple businesses.[16]

In response to objections from counsel for Marlow Heights that the precise location of the easement would be unclear to a person searching the land records, the court directed Macy's to obtain a survey of the Shopping Center setting out the location of the easement in metes and bounds. Macy's complied, obtaining a new survey plat that depicted access easements, parking, and ingress/egress easements and a metes-and-bounds description of those areas.[17]

Marlow Heights filed an objection to the new survey, incorporating all its arguments made at trial and in its pretrial motions, and specifically objecting to the inclusion of "loading docks, pad sites and the associated parking areas, interior roadways not used for

[16] It also was consistent with Macy's' practice of obtaining reciprocal easement agreements providing for "cross-access, ingress, egress, and parking" at its other store locations.

[17] The new survey plat was nearly identical to the ALTA plat except that the parking areas were marked with a "///" pattern and the access roads with a "- - -" pattern.

access or ingress/egress, trash areas, and other areas as to which [Macy's] have not sought an easement."

On appeal, Marlow Heights contends the circuit court erred "by entering, as part of its final order, a metes-and-bounds legal description and corresponding drawing that exceed the scope requested by [Macy's] and have no basis in the evidentiary record." It asserts that Macy's presented "no evidence of any particular location for the easement" at the bench trial and did not present expert testimony.

These assertions lack merit. Macy's took the position at trial that its easement extended to all the parking areas and all the access roads. Expert testimony was unnecessary to establish the locations of those areas, which were apparent from the ALTA plat that was introduced into evidence. A new survey only was undertaken post-trial because Marlow Heights argued that, even though the proposed declaratory judgment specified that the easement was "upon the parking areas and access roads" depicted on the ALTA plat, a person searching the land records would be unable to determine the location of the easement with sufficient precision. The new survey denoted those areas with differing patterns on the plat and provided a legal description. It did not alter the court's ruling about the location of the easement.

Marlow Heights also reiterates its objection to the survey on the basis that it includes areas, such as loading docks, over which Macy's disclaimed any interest at the hearing.[18]

[18] Although those areas were included within the easement area under the terms of the MOA, counsel for Macy's agreed that it had not asserted a claim over those areas in its complaint.

To the extent that the survey and the legal description of the Shopping Center are overinclusive, the language in the declaratory judgment controls. It specifies that the easement is over the parking areas and access roads. This was the relief Macy's sought and the relief granted by the court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.